91-1568

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DON E. HESKETT, DOROTHY M. HESKETT,
and DON E. HESKETT, JR.,
Petitioners,

vs.

SILOAM LODGE #35, OF THE FREE
AND ACCEPTED MASONS OF MICHIGAN,
Respondents.

Petition for a Writ of Certiorari from the
Michigan State Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Michigan State Appellate Courts have violated Petitioners Constitutional right to due process of law, by allowing an adverse decision of the Michigan Court of Appeals to stand in the face of evidence that one of the judges of the Courts of Appeals is a member of the Masons, the adverse party in this case.

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PETITION FOR WRIT OF CERTIORARI

PRAYER

Petitioners respectfully request that a Writ of Certiorari issue to review the Orders of the Michigan Supreme Court in this case.

OPINIONS/ORDERS BELOW

The Order of the Michigan Supreme Court, upon Petitioners **Motion for Rehearing**, was decided December 20, 1991 (Reconsideration granted in part, denied in all other respects). (Appendix "A"). The Order of the Michigan Supreme Court,

upon **Application For Leave To Appeal**, and Petitioners' **Motion For Disclosure of Affiliation, Disqualification and Remand,** was entered September 24, 1991 (Denied). (Appendix "B"). The Opinion of the Michigan Court of Appeals was entered November 8, 1990 (Affirming the St. Joseph County Circuit Court). (Appendix "C"). The Judgment of the St. Joseph County Circuit Court was entered on June 7, 1988 (Ordering, ***inter alia***, property to be delivered to Respondent, Masonic Lodge). (Appendix "D").

JURISDICTION

The Order of the Michigan Supreme Court was entered on December 20, 1991. This Petition for Certiorari is within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that no person shall be: "deprived of life, liberty, or property without due process of law . . . ." U. S. Const., Am. 5.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Am. 14.

STATEMENT OF THE CASE

Respondent brought this civil action in the St. Joseph County Circuit Court, Centreville, Michigan, seeking Claim And Delivery of items of personal property from Petitioners. Fundamentally, the Respondent ("Masons"), claimed that the Petitioners had possession of Masonic furniture and other personal property which belonged to the Masons.

Petitioners defended, claiming that the Masons had entered into a contract with Petitioners, whereby the Masons agreed to sell the various furniture and items to the Petitioners.

After a Bench Trial, that occurred in parts over several months, the Trial Court initially ruled that the Masons had, in fact, entered into a binding contract for the sale of the property. The Trial Court also ruled, however, that it believed the consideration paid by Petitioners was inadequate, and offered further hearings on the subject. There was a finding that no fraud or overreaching had occurred.

Petitioners offered proofs-testimony that the true value of the personal property was not known to any of the parties at the time of contracting, but was only discovered two years after the contract, when Petitioners sought to insure the property. Nevertheless, the Trial Court entered its decision that the purchase price was so unconscionable, in relation to the actual value of the property, that the contract would not be enforced. Accordingly, a Judgment was entered on June 7, 1988. (Appendix "D").

Petitioners took an appeal, by right, to the Michigan Court of Appeals, seeking review of the decision of the Trial Court. On November 8, 1990, the Court of Appeals rendered a short opinion, affirming the Judgment of Trial Court. (Appendix "C"). The judges on the 3-judge panel included Judge Robert B. Burns, a former Court of Appeals judge, "sitting on the Court of Appeals by assignment." (Appendix "C").

Believing themselves aggrieved by the adverse decision of the Michigan Court of Appeals, Petitioners filed an Application for Leave to Appeal, in the Michigan Supreme Court, on or about November 27, 1990.

After the Petitioners had filed the Application to the Michigan Supreme Court, the Petitioners discovered information in the 1979 edition of a publication entitled, "**AMERICAN BENCH**",

wherein it was disclosed that Judge Robert B. Burns, of the Michigan Court of Appeals, is a Mason. (Appendix "E").

Promptly upon discovery of Judge Burns' affiliation with the Masons, Petitioners filed a **Motion for Disclosure of Affiliation, Disqualification and Remand,** with the Michigan Supreme Court, dated December 27, 1990.

The Masons have never responded to proceedings in the Michigan Supreme Court.

On September 24, 1991, the Michigan Supreme Court entered its Order denying the **Application for Leave to Appeal,** and, treating the subsequent **Motion for Disclosure** as a Motion to Disqualify, denied relief. Justice Levin dissented, indicating he would grant leave. (Appendix "B").

On about October 9, 1991, Petitioners filed a **Motion for Rehearing** in the Michigan Supreme Court, specifically demanding that the Court respond to the claim that Petitioners' due process rights, under the Fifth and Fourteenth Amendments were being violated by failure of the courts to provide a fair and impartial tribunal.

The Michigan Supreme Court thereafter entered its Order of December 20, 1991, granting reconsideration solely to indicate that the prior Motion to Remand was also denied (the Court having not made such a specific determination in the first Order). (Appendix "A"). The Court made no reference whatsoever to Petitioners' claims of due process.

The Masons did not file any pleadings of responses to the **Motion for Rehearing.**

REASONS FOR GRANTING THE WRIT

One of the most fundamentally protected concepts of due process is the right of a litigant to present his case before a fair and impartial tribunal. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S. Ct. 279, 49 L.Ed.2d 683 (1976); *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L.Ed.2d 712 (1975); *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 1778, 29 L.Ed.2d 83 (1972); *Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778, 29 L.Ed.2d 423 (1971); *Strong v. Pontiac Gen. Hosp.*, 419 Mich. 872, 347 N.W.2d 696 (1982); *Crampton v. Dept. of State*, 395 Mich. 347, 235 N.W.2d 352 (1975); *Murray v. Milner*, 118 Mich. App. 352, 325 N.W.2d 422 (1982), *rev'd*, 419 Mich. 872, 348 N.W.2d 6; U. S. Const., Am's 5, 14.

Petitioner was denied the due process of the law by the failure of Michigan Court of Appeals Judge Robert B. Burns to disclose his Masonic affiliation and disqualify himself, or reject the assignment when offered. Petitioner is not asserting a violation of due process in the appellate process, *per se*. Petitioner is asserting that once the State of Michigan provides a process for the judicial review of litigation, which will result in deprivation of property, due process demands that the decision makers be fair and impartial. *Id.* The very notion of "hearing", under the Fourteenth Amendment, assumes that the decision maker will listen to arguments of both sides before making decisions. *See, Billington v. Underwood*, 613 F.2d 91 (CA5 Ga. 1980).

An expression of this concept appears in the Michigan code of ethics for Judges. Is it to be said that these "Canons" of ethical conduct do not apply to appellate judges, and that they do not embody the due process concept of impartiality and fairness?

The Michigan canons of ethics for judges clearly recognizes the obligation of a judge to avoid the appearance of impropriety, and to assure that persons in the posture of Petitioners should be able to maintain: "Confidence in the integrity and impartiality

of the judiciary." **MICH. CODE OF JUDICIAL CONDUCT**, Canons 2(A), (B), (C), 3(C), 5.

A reviewing judge should be motivated, "to request reassignment of the case if he is aware of any prejudices which he holds which would interfere with impartiality." *Olson v. Doerfler*, 14 Mich. App. 428; 165 N.W.2d 648 (1968). It has been determined that a judge should disqualify himself in situations where, "experience teaches that the probability of actual bias on the part of the judges . . . is too high to be constitutionally tolerable." *Pitoniak v. Borman's, Inc.*, 104 Mich. App. 718, 724; 305 N.W.2d 305 (1981) (cites omitted). This Court observed that it was a violation of the Fourteenth Amendment when a judge, who had acted as a Grand Jury, was then the same judge who tried the very persons who had been accused through the judge's investigations. *In Re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L.Ed. 942 (1955). Surely, our Constitutional safeguard against the deprivation of property, without due process, is violated when a reviewing judge may be allowed to have an interest in one of the parties before him, and make no effort to disclose the interest or disqualify himself. How is the fundamental right to a fair and impartial tribunal served by turning our backs to the implication of these facts?

How can there by any reasonable dispute that the state of the facts here leaves a "taste" of impropriety? There is no record to refute that Judge Burns is a Mason! How can such an affiliation by "constitutionally tolerable" where the Plaintiff is the Masonic Lodge trying to recover Masonic property? At a minimum, the judge in such a position is privy to feelings, beliefs, opinions which are not of record. *See, In Re Murchison, supra.*

The impropriety of Judge Burns was, *arguendo*, compounded when the Michigan Supreme Court did absolutely nothing (at least on the record), to clear up this "appearance of impropriety", that they have publicly opposed in the past, under other circum-

stances. *See, People v. Pulley*, 411 Mich. 523; 309 N.W.2d 170, 172 (1981)., or even give Petitioners the benefit of an explanation. (Appendix "A" and "B").

Petitioners' due process rights have been dismissed by the Michigan Supreme Court, with no more explanation than as if to say, **"Because"**, as an impatient parent would say when pestered by a small, inquisitive child. But Petitioner has lost substantial property rights, and the judges who reviewed Petitioners' claims (how can the influence of Judge Burns be disregarded?), had a personal interest in the outcome. After all, the Respondent here took the position, during trial, that the subject property actually belonged to **all** Masons. Thus, Judge Burns was an alleged owner of the subject property. The apparent decision, by Judge Burns, to sit in review of this case, without disclosing, or disqualifying, is *arguendo*, highly unethical, and a clear (if not deliberate) violation of the fundamental right of due process by the Michigan Appellate Courts. *Cf., David v. Ann Arbor Public Schools*, 313 Fed. Supp. 1217 (D.C. MI, 1970). *See also, e.g., Nebraska Press, supra.*

It is believed that the Federal Constitution requires that the Michigan Supreme Court be ordered to remand this case to the Michigan Court of Appeals, for reconsideration by a new panel of judges who have no affiliation with either party. For these foregoing reasons, it is respectfully requested that this Court grant the Petition For A Writ Of Certiorari.

Respectfully submitted,

/s/ Patrick W. Priest, of the Michigan
and United States Supreme Court Bars
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(616) 273-6075

Counsel for Petitioners

Dated: March 24, 1992

APPENDIX

APPENDIX A

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: December 20, 1991

90470(47)

SILOAM LODGE #35 OF THE FREE AND ACCEPTED MASONS OF MICHIGAN,
Plaintiff-Appellee,

v

DON E. HESKETT, DOROTHY M. HESKETT and DON E. HESKETT, JR.,
Defendants-Appellants.

SC: 90470
COA: 109824
LC: 85-325-PD

On order of the Court, the motion for rehearing is treated as a motion for reconsideration of this Court's order of September 14, 1991, and it is GRANTED in part. The order of September 24, 1991, is amended to provide that the motion for disclosure of affiliation, disqualification and remand was considered and denied. In all other respects, the motion for reconsideration is DENIED.

Levin, J., would grant reconsideration and on reconsideration would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

December 20, 1991 /s/ Jacqueline B. McKinnon
Deputy Clerk

APPENDIX B

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: September 24, 1991

90470 & (43)

SILOAM LODGE #35 OF THE FREE AND ACCEPTED MASONS OF MICHIGAN,
Plaintiff-Appellee,

v

DON E. HESKETT, DOROTHY M. HESKETT and DON E. HESKETT, JR.,
Defendants-Appellants.

SC: 94070
COA: 109824
LC: 85-325-PD

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion for disclosure of affiliation is treated as a motion that a member or members of this Court disqualify themselves and, so treated, it is considered, and it is DENIED.

Levin, J., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

September 24, 1991 /s/ Jacqueline B. McKinnon
Deputy Clerk

APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS

No. 109824

SILOAM LODGE #35 OF THE FREE AND ACCEPTED MASONS OF MICHIGAN,
Plaintiff-Appellee,

v

DON E. HESKETT, DOROTHY M. HESKETT and DON E. HESKETT, JR.,
Defendants-Appellants.

Before: MacKenzie, P.J., and Sawyer and R. B. Burns,* JJ.

PER CURIAM.

Defendants appeal from a judgment for claim and delivery entered in favor of plaintiff. We affirm.

The parties entered into an agreement to sell the second and third floors of the Constantine Masonic Temple in Constantine, Michigan. The second floor was not in use and the third floor was used by plaintiff for its meetings. Plaintiff intended to continue holding meetings and an agreement was reached to rent the third floor of the building from defendants for plaintiff's use. In accordance with the agreement, certain personal property belonging to plaintiff was to be sold to defendants in exchange for two years free rent. A dispute thereafter arose over the nature and extent of the personalty which was sold to defendants. Specifically, plaintiff maintains that none of the personalty containing Masonic emblems or used in Masonic rituals was intended to be

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

sold, while defendants maintain that all such personalty, with the exception of certain silverware and dishware located on the second floor, was sold to defendants.

The trial court determined that a contract did exist between the parties, but concluded that the contract was unconscionable under the Uniform Commercial Code, specifically, MCL 440.2302; MSA 19.2302. See also, generally, *Northwest Acceptance Corp. v Almont Gravel, Inc.*, 162 Mich App 294; 412 NW2d 719 (1987). We review the trial court's finding that the contract was unconscionable to determine if that finding was clearly erroneous. *Id.* at 304. A finding of fact by the trial court is clearly erroneous when the reviewing court, after reviewing the entire record, is left with a definite and firm conviction that a mistake has been committed. *Id.* After reviewing the record, we are not convinced that the trial court committed a mistake and that its finding of unconscionability is clearly erroneous.

Affirmed. Plaintiff may tax costs.

/s/ Barbara B. MacKenzie
/s/ David H. Sawyer
/s/ Robert B. Burns

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF ST. JOSEPH

* * * * * *

File No. 85-235 PD

SILOAM LODGE #35 OF THE FREE AND
ACCEPTED MASONS OF MICHIGAN,
Plaintiff,

vs.

DON E. HESKETT, DOROTHY M. HESKETT
and DON E. HESKETT, JR.,
Defendant.

THEODORE J. TUCKER (P21612)
Attorney for Plaintiff

PATRICK W. PRIEST (P27593)
Attorney for Defendant

JUDGMENT

At a session of said Court held in the Courthouse in the Village of Centreville in said County on the 7th day of June, 1988.

PRESENT: HONORABLE JAMES NOECKER (P18319),
CIRCUIT JUDGE

Bench Trial of Plaintiff's Complaint for claim and delivery and for return of Lodge personal property having been held, and the Court having made written opinions on December 30, 1987, and May 23, 1988, and making certain findings of fact as set forth in the opinions, and the Court being further advised in the premises;

IT IS ORDERED AND ADJUDGED that Plaintiff have judgment for claim and delivery and the return of all of its Lodge Room property located on the third floor of the Defendant's building, located at 138 South Washington Street, Constantine, Michigan, including any property heretofore removed by Defendants. Possession of the personal property shall be made available to Plaintiff following twenty-eight (28) days from the date of entry of this judgment.

IT IS FURTHER ORDERED AND ADJUDGED that Defendants have judgment against Plaintiff in the sum of $2,400.00 as rental for the use of the third floor Lodge Room of Defendant's property, located at 138 South Washington Street, Constantine, Michigan, which judgment shall be payable prior to the removal of Plaintiff's personal property.

IT IS FURTHER ORDERED AND ADJUDGED that neither Plaintiff nor Defendants shall be entitled to costs, interest or attorney fees.

Dated: /s/ James Noecker, Circuit Judge

ATTEST: A TRUE COPY

/s/ Clerk

APPROVED AS TO FORM AND CONTENT:

/s/ Theodore J. Tucker (P21612) Dated: May 27, 1988
Attorney for Plaintiff
WEINER, WADE, TUCKER & DAVIDSON
P.O. Box 391
Three Rivers, MI 49093

/s/ Patrick W. Priest (P27593) Dated:
Attorney for Defendant

APPENDIX E

THE AMERICAN BENCH—1979

MICHIGAN

BURNS, Robert B. *(Judge, Michigan Court of Appeals)* Elected 1964, reelected 1970 and 1976. Born Gobles, Michigan, March 26, 1920. Wife Marian J., children Michael, Maureen and Kevin. Educated at Western Michigan University B.S. 1941 and Wayne State University LL.B. 1948. Appointed Judge, Grand Rapids Municipal Court 1954.

Member State Bar of Michigan, Kent County and American Bar Associations. Served RCAF and USAF 1941-46. ***Member Masons,*** Elks and American Legion.

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